

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 14, 2005 Session

LEE'S HOME CENTER, INC. v. BOBBY A. MORRIS ET AL.

**Appeal from the Chancery Court for Robertson County
No. 16757 Carol A. Catalano, Chancellor**

No. M2004-02158-COA-R3-CV - Filed on June 21, 2006

This appeal involves a dispute between a contractor and a material supplier regarding engineered wood I-joists. The contractor refused to pay for the I-joists because he believed they contributed to a structural failure in a house he had built. The supplier filed suit against the contractor in the Chancery Court for Robertson County. The contractor filed a counterclaim for breach of implied warranty of fitness for a particular purpose. The supplier moved for summary judgment on its claim and on the contractor's counterclaim. The trial court granted the supplier's motion and entered a \$22,917.91 judgment for the supplier. The contractor takes issue on this appeal only with the dismissal of its counterclaim. We have determined that the trial court erred by dismissing the contractor's counterclaim because the record contains genuine, material disputes with regard to the facts relevant to the counterclaim.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Louis W. Oliver, III, Hendersonville, Tennessee, for the appellant, Bobby A. Morris.

W. Bryan Brooks, Parks T. Chastain, and Scott T. Foster, Nashville, Tennessee, for the appellee, Lee's Home Centers, Inc.

OPINION

I.

Bobby A. Morris has been a general contractor in Tennessee since 1978. For the past fifteen years, he has constructed single-family houses. In 2000, he acquired a lot in the Cleveland Hall subdivision in Old Hickory, Tennessee on which he planned to construct a spec house.¹ Rather than

¹A "spec house" is a house that is constructed without a buyer. The builder speculates that it will be able to sell the house at a profit once it is completed.

hiring an architect to design the house, Mr. Morris purchased a set of completed plans for a 3,200 square foot, two story, brick house from McCullough House Plans in Madison, Tennessee.

Mr. Morris did not perform any of the construction work himself but rather relied on subcontractors and the specialty trades to build his houses. He also relied on others to estimate the materials that would be required to complete a particular job. Accordingly, he gave the plans for the Cleveland Hall house to David Atkins who was employed by Lee's Home Center, Inc. in Springfield, Tennessee and requested him to estimate the total amount of lumber that would be required to construct the house according to the plans. Mr. Atkins had provided this service to Mr. Morris for many years.

While Mr. Atkins was preparing his estimate, Mr. Morris decided that the standard plans needed to be changed to accommodate the shape of the lot on which the house would be built. Particularly, Mr. Morris decided that the location of the garage should be moved because the shape of the lot would not allow convenient access to the garage. Mr. Morris contacted Bill Green, the owner of McCullough House Plans, to discuss moving the garage. Mr. Green suggested that Mr. Morris could move the garage from the back to the side of the house and that he could replace the support posts in the garage with I-joists spanning the sixteen-foot garage door.

Mr. Morris decided to follow Mr. Green's suggestions and revised the plans accordingly. He also provided the revised plans to Mr. Atkins for the preparation of a revised materials estimate. Two or three days later, Mr. Atkins requested to meet with Mr. Morris to obtain answers to his questions about the revised plans. Part of the discussions involved the I-joists that Mr. Morris had decided to use in place of support posts in the garage. At first, Messrs. Morris and Atkins decided that 16-inch engineered wood I-joists would be appropriate for the garage, but Mr. Atkins determined that Lee's Home Center did not have a sufficient number of 16-inch I-joists on hand. Mr. Atkins informed Mr. Morris that he had a sufficient number of 14-inch I-joists but that he was unsure about whether they would be suitable for the project.

While Mr. Morris was sitting in his office, Mr. Atkins telephoned Lumberman's Wholesale Distributors, the manufacturer of the I-joists. Mr. Atkins talked about the I-joists with Timothy Simmons, an engineered wood specialist. Mr. Morris never talked directly with Mr. Simmons. Following this telephone call, Mr. Morris decided that the 14-inch I-joists were suitable for his project.

Mr. Morris ended up constructing the garage of the spec house using two 14-inch I-joists side-by-side. He believed that they would have sufficient strength to carry the load from the upper floors of the house. Ultimately, Mr. Morris's belief proved to be misplaced because the kitchen, bedroom, and upstairs hallway began to sag. To remedy the problem, Mr. Morris was required to jack up the second story of the house and insert steel plates to provide the structural strength necessary to carry the weight of the upper stories of the house.

Mr. Morris did not pay for the 14-inch I-joists. After he ignored Lee's Home Center's request for payment, Lee's Home Center perfected a materialmen's lien against the house. Mr.

Morris was able to obtain a release of the lien only by filing a bond as required by Tenn. Code Ann. § 66-11-142 (2004). Mr. Morris sold the house, purportedly at a loss, after the lien was released.

On April 3, 2002, Lee's Home Center filed suit in the Chancery Court for Robertson County seeking to recover \$20,282.43 from Mr. Morris.² Mr. Morris filed an answer and counterclaim asserting that Lee's Home Center had breached its implied warranty of fitness for a particular purpose and, therefore, that he was entitled to set off his liability to Lee's Home Center with the cost of the defective I-joists.

On March 29, 2004, Lee's Home Center filed a motion for summary judgment both on its claim and on Mr. Morris's counterclaim.³ Mr. Morris responded to the motion by asserting that the depositions on file demonstrated the existence of genuine disputes regarding the facts relevant to its counterclaim. The trial court decided that Lee's Home Center was entitled to a summary judgment both on its claim and on Mr. Morris's counterclaim because Mr. Morris had relied on Mr. Simmons's opinion rather than Mr. Atkins's opinion when he purchased the 14-inch I-joists. The trial court also concluded that Mr. Simmons had not been fully informed regarding the particulars of Mr. Morris's intended use of the I-joists and that Mr. Morris was able to choose the appropriate building materials for the house because of his extensive experience building homes without either Mr. Atkins's or Mr. Simmons's advice. Accordingly, on July 28, 2004, the trial court filed an order granting Lee's Home Center a summary judgment on its claim and on Mr. Morris's counterclaim and awarding Lee's Home Center a \$22,917.91 judgment against Mr. Morris and his bonding company. Mr. Morris and his bonding company have appealed.

II.

The standards for reviewing summary judgments on appeal are well settled. Summary judgments are proper in virtually any civil case that can be resolved on the basis of legal issues alone. *Fruge v. Doe*, 952 S.W.2d 408, 410 (Tenn. 1997); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001). They are not, however, appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. Thus, a summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion – that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001).

² Lee's Home Center also named National Grange Mutual Insurance Company, the company that had provided the bond to obtain the release of the lien, as a defendant.

³ While Lee's Home Center's summary judgment motion was explicitly limited to seeking a summary judgment on Mr. Morris's counterclaim, its accompanying memorandum of law in support of its motion also sought a summary judgment on its own claim. Lee's Home Centers should have included both grounds in its motion, Tenn. R. Civ. P. 7.02(1). However, neither Mr. Morris nor the trial court took issue with this oversight and, in fact, the parties and the trial court acted as if Lee's Home Centers offensive summary judgment motion was properly raised. Accordingly, for the purpose of this appeal, we will construe Lee's Home Center's motion as if it properly sought a summary judgment on its claim against Mr. Morris.

The party seeking a summary judgment bears the burden of demonstrating that no genuine dispute of material fact exists and that it is entitled to a judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002); *Shadrick v. Coker*, 963 S.W.2d 726, 731 (Tenn. 1998). To be entitled to a judgment as a matter of law, the moving party must either affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Byrd v. Hall*, 847 S.W.2d at 215 n.5; *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

Once the moving party demonstrates that it has satisfied Tenn. R. Civ. P. 56's requirements, the non-moving party must demonstrate how these requirements have not been satisfied. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). Mere conclusory generalizations will not suffice. *Cawood v. Davis*, 680 S.W.2d 795, 796-97 (Tenn. Ct. App. 1984). The non-moving party must convince the trial court that there are sufficient factual disputes to warrant a trial (1) by pointing to evidence either overlooked or ignored by the moving party that creates a factual dispute, (2) by rehabilitating evidence challenged by the moving party, (3) by producing additional evidence that creates a material factual dispute, or (4) by submitting an affidavit in accordance with Tenn. R. Civ. P. 56.07 requesting additional time for discovery. *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Byrd v. Hall*, 847 S.W.2d at 215 n.6. A non-moving party that fails to carry its burden faces summary dismissal of the challenged claim because, as our courts have repeatedly observed, the "failure of proof concerning an essential element of the cause of action necessarily renders all other facts immaterial." *Alexander v. Memphis Individual Practice Ass'n*, 870 S.W.2d 278, 280 (Tenn. 1993).

A summary judgment is not appropriate when a case's determinative facts are in dispute. However, for a question of fact to exist, reasonable minds must be able to differ over whether some alleged occurrence or event did or did not happen. *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d 646, 647 (Tenn. 1995); *Harrison v. S. Ry. Co.*, 31 Tenn. App. 377, 387, 215 S.W.2d 31, 35 (1948). If reasonable minds could justifiably reach different conclusions based on the evidence at hand, then a genuine question of fact exists. *Louis Dreyfus Corp. v. Austin Co.*, 868 S.W.2d 649, 656 (Tenn. Ct. App. 1993). If, on the other hand, the evidence and the inferences reasonably drawn from the evidence would permit a reasonable person to reach only one conclusion, then there are no material factual disputes, and the question can be disposed of as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d at 695; *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86, 91 (Tenn. 1999); *Beaudreau v. Gen. Motors Acceptance Corp.*, 118 S.W.3d 700, 703 (Tenn. Ct. App. 2003).

Summary judgments enjoy no presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 285 (Tenn. 2001). Accordingly, appellate courts must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We must consider the evidence in the light most favorable to the non-moving party, and we must resolve all inferences in the non-moving party's favor. *Godfrey v. Ruiz*, 90 S.W.3d at 695; *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001). When reviewing the evidence, we must determine first whether factual disputes exist. If a factual dispute exists, we must then determine whether the fact is material to the claim or defense upon which the

summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

III.

The sole issue Mr. Morris raises on this appeal involves the dismissal of his claim against Lee's Home Center for breach of the implied warranty of fitness for a particular purpose.⁴ He asserts that genuine issues of material facts exist as to whether he relied on the skill and judgment of Mr. Atkins in selecting the 14-inch I-joists for the project and that the trial court erred by weighing the evidence and assessing the credibility of the witnesses. We agree that the record contains material factual disputes regarding Mr. Morris's breach of warranty claim.

A.

The interactions between a seller and a buyer may, in certain circumstances, give rise to an implied warranty of fitness for a particular purpose. Tenn. Code Ann. § 47-2-315 (2001) states that an implied warranty of fitness for a particular purpose arises where "the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods" To be successful with a Tenn. Code Ann. § 47-2-315 claim, the buyer must prove (1) that the seller was aware that the buyer had a particular purpose⁵ for which the goods were required, (2) that the seller knew that the buyer was relying on the seller's skill or judgment to provide the buyer with goods that were fit for that particular purpose, and (3) that the buyer must have actually relied on the seller's skill or judgment. *Jet Printing v. Deep S. Wholesale Paper Co.*, No. M2001-02582-COA-R3-CV, 2003 WL 152644, at *4 (Tenn. Ct. App. Jan. 23, 2003) (No Tenn. R. App. P. 11 application filed); *Alumax Aluminum Corp. v. Armstrong Ceiling Sys., Inc.*, 744 S.W.2d 907, 910 (Tenn. App. 1987); *Fiddler's Inn, Inc. v. Andrews Distrib. Co.*, 612 S.W.2d 166, 171 (Tenn. App. 1980).

According to Tenn. Code Ann. § 47-2-315, an implied warranty of fitness for a particular purpose may be modified or excluded pursuant to Tenn. Code Ann. § 47-2-316. Whether or not an implied warranty of fitness for a particular purpose arises in any individual case is "basically a question of fact to be determined by the circumstances of the contracting." Tenn. Code Ann. § 47-2-315 cmt.1. Once an implied warranty of fitness for a particular purpose has been established,

⁴ Mr. Morris has not taken issue with the trial court's decision to grant Lee's Home Center a summary judgment on its claim for unpaid materials.

⁵ According to Tenn. Code Ann. § 47-2-315 cmt. 2:

A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.

the buyer must then show that the goods were not fit for the purpose for which they were intended. *Masters v. Rishton*, 863 S.W.2d 702, 706 (Tenn. Ct. App. 1992).

An implied warranty of fitness for a particular purpose may arise even when a seller is simply conveying information from a manufacturer. For example, such a warranty has been found when the seller advises the buyer of a product's fitness for a particular purpose based upon information in the manufacturer's catalogue, *Pawelec v. Digitcom, Inc.*, 471 A.2d 60, 62-63 (N.J. Super. Ct. App. Div. 1984) (*overruled on other grounds*), or when the seller vouches for a product's fitness for a particular purpose based upon advice obtained from the manufacturer. *Dobias v. W. Farmers Ass'n*, 491 P.2d 1346, 1346 (Wash. Ct. App. 1971). An implied warranty of fitness for a particular purpose has also been found where a seller acted as an agent of the manufacturer. *Cooper Paintings & Coatings, Inc. v. SCM Corp.*, 62 Tenn. App. 13, 18, 457 S.W.2d 864, 866-867 (1970).

As the cases illustrate, retailers are not per se excluded from creating an implied warranty simply because they pass on information from the manufacturer to the buyer. However, if a seller is merely acting as a conduit for information between a buyer and a manufacturer, an implied warranty of fitness for a particular purpose may not arise. See *Commercial Refrigeration, Inc. v. Refrigeration Products Co.*, 586 S.W.2d 125, 128 (Tenn. Ct. App. 1979) (seller did not create an implied warranty when seller was only a conduit through which the manufacturer and the buyers were brought together, and the buyers did not rely upon the seller's skill or judgment to select or furnish suitable goods).

B.

Because the trial court granted a summary judgment dismissing Mr. Morris's counterclaim, the question we must decide is whether this record contains any genuine disputes with regard to the facts material to Mr. Morris's breach of implied warranty for a particular purpose claim. The presence of one or more factual disputes relating to any of the essential elements of Mr. Morris's counterclaim will necessitate vacating the portion of the summary judgment dismissing the counterclaim. Accordingly, we must carefully examine the evidence in the record regarding the communications between Messrs. Morris, Atkins, and Simmons regarding the suitability of using 14-inch I-joists in Mr. Morris's spec house in Cleveland Hall.

It is undisputed that Mr. Morris initially provided Mr. Atkins with a copy of the original floor plans and the altered plans. It is also undisputed that Mr. Morris had discussions with Mr. Atkins about both sets of plans, particularly the changes in the second set of plans. It is likewise undisputed that Mr. Atkins brought up the use of 14-inch I-joists but was unable to answer questions about the suitability of these I-joists on his own. Accordingly, it is undisputed that Mr. Atkins turned to Mr. Simmons for assistance. Finally, it is undisputed that Mr. Morris purchased the 14-inch I-joists and used them in constructing the house in Cleveland Hall and that the house later had a structural failure where these I-joists had been installed.

The particulars of the conversations among Messrs. Morris, Atkins, and Simmons are, however, disputed. Mr. Morris testified that he had a lengthy conversation with Mr. Atkins

regarding the changed plans and his decision to remove the support posts in the garage. He recalled specifically that the plans were spread out on Mr. Atkins's desk during this conversation and that they specifically discussed that the ceiling and the walls of the garage would be load-bearing. He also testified that when Mr. Atkins could not answer all his questions regarding the 14-inch I-joists, Mr. Atkins telephoned Mr. Simmons for advice. Mr. Morris insists that he overheard Mr. Atkins's telephone conversation with Mr. Simmons during which they discussed that the house was multi-storied and which walls were load-bearing, and during which they considered using other materials such as laminated beams instead of I-joists. Mr. Morris also testified that at the conclusion of the telephone call, Mr. Atkins announced that "they [Lumberman's Wholesale Distributors] said they [the 14-inch I-joists] would work." In addition, Mr. Morris testified that Mr. Atkins told him that the use of two 14-inch I-joists side-by-side "would just make it better" and that he relied on Mr. Atkins's representations regarding the fitness of the I-joists when he decided to purchase them.

Mr. Atkins's recollection of these conversations differs dramatically from Mr. Morris's. He testified that he had no idea that Mr. Morris was intending to remove the support posts in the garage and that he and Mr. Atkins never discussed the load-bearing walls. According to Mr. Atkins, Mr. Morris only wanted to know what kind of I-joist would span the width of the garage. Mr. Atkins also testified that he normally answers that kind of question by referring to a book prepared by Lumberman's Wholesale Distributors but that he could not find his book on that particular day. Accordingly, he telephoned Mr. Simmons to ask what distance a 14-inch I-joist would span. Mr. Atkins testified that he did not provide any information regarding the house plans to Mr. Simmons because doing so would have prompted Mr. Simmons to ask for the plans rather than simply answering the question over the telephone.⁶

Mr. Simmons's recollection of the telephone conversation is consistent with Mr. Atkins's. He testified that Mr. Atkins only asked him how far a 14-inch I-joist would span. He insists that Mr. Atkins provided him no information regarding the house, including which walls were load-bearing. According to Mr. Simmons, he simply looked up the product in his charts and read the distance that a 14-inch I-joist would span without further discussion.

The discrepancies in the accounts of the conversations between Messrs. Morris and Atkins and the telephone conversation between Messrs. Atkins and Simmons undermine the ability of any court to determine as a matter of law that Mr. Atkins's statements to Mr. Morris do not support a claim for breach of warranty of fitness for a particular purpose. We cannot conclude as a matter of law that Mr. Morris did not rely on Mr. Atkins's representations because Mr. Morris testified unequivocally that he did. Neither can we conclude, as a matter of law, that Mr. Morris relied on his own expertise regarding the load-bearing capacities of 14-inch manufactured wood I-joists when

⁶Mr. Atkins explained in his deposition that "he [Mr. Simmons] goes by just the first floor, too, because he won't tell you over the phone if you start stacking walls and you get into weight-bearing walls."

he decided to use them for the project rather than the recommendations of either Mr. Atkins or Mr. Simmons.⁷

Based on our independent review of this record, we can only conclude that the trial court weighed the evidence regarding the conversations among Messrs. Morris, Atkins, and Simmons and, accrediting the testimony of Messrs. Atkins and Simmons, determined that Mr. Morris did not rely on Mr. Atkins's representations regarding the suitability of the 14-inch I-joists for the particular application at the Cleveland Hall house. While this sort of reasoning might be appropriate in a bench trial, it is entirely inappropriate at the summary judgment stage. *Byrd v. Hall*, 847 S.W.2d at 212; *Burgess v. Harley*, 934 S.W.2d 58, 66 (Tenn. Ct. App. 1996). In light of the different accounts of these conversations, the trial court should have refrained from dismissing Mr. Morris's counterclaim on summary judgment.

IV.

We vacate the portion of the July 28, 2004 order dismissing Mr. Morris's counterclaim against Lee's Home Center and remand the case to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal to Lee's Home Center, Inc. for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., P.J., M.S.

⁷ Both Mr. Atkins and Mr. Simmons testified that it was obvious to them after they learned the details of Mr. Morris's use of 14-inch I-joists that replacing the support posts in the garage with two I-joists side-by-side would not work. As the record reflects, this conclusion was not so obvious to Mr. Morris.